months beginning with the giving of the notice of appeal request the Director-General in writing to send the appeal forward to the Special Commissioners, and the Director-General shall send the appeal forward accordingly within three months after receiving any such request."

There is no reason why the defendant should not take action under section 102(2) to get his appeal heard by the Special Commissioners. If the Director-General refuses to send the defendant's appeal forward to the Special Commissioners in accordance with the section, the defendant can have recourse to a proper remedy in the court.

On behalf of the defendant it is further submitted that it is too late for the plaintiff to bring this action on the ground that it has been time-barred under section 6(4) of the Limitation Ordinance, which reads —

"An action to recover any penalty or forfeiture of sum by way of penalty or forfeiture recoverable by virtue of any Ordinance or other written law shall not be brought after the expiration of one year from the date on which the cause of action accrued."

As I have pointed out, section 125(2) of the Income Tax Act provides that any penalty on any person under section 113(2) shall be collected as if it were part of the tax payable by that person and that section 103 applies to the penalty. In my opinion, this means that if tax can be collected and recovered at any time without being subject to any law of limitation, the penalty can also be collected and recovered at any time without being subject to any law of limitation. I am not aware of any law which prescribes the time limit within which to recover tax after tax is assessed in proper time, although there is provision limiting the time within which tax can be assessed, e.g. sections 91(1) and 91(2)(b) of the Income Tax Act. One should not confuse the two time limits, i.e. time limit within which to assess tax or penalty and time limit within which to recover tax or penalty after it has been assessed. Since section 6(4) of the Limitation Ordinance is intended to be a general provision applying to penalties generally whereas section 125(2) of the Income Tax Act is intended to apply specifically to penalty under section 113(2) of the Act and since section 125(2) of the Act has been introduced after the enactment of section 6(4) of the Ordinance, in my opinion section 125(2) of the Act prevails over section 6(4) of the Ordinance in so far as penalty under section 113(2) of the Act is concerned.

As regards the plaintiff's claim for the sums of $9,328.35 and $300 being increases arising by virtue of section 103(4), these are increases in the section 113(2) penalty and therefore sections 125(2) and 106 apply to them. Section 106(3) clearly provides that the court shall not entertain any plea that the amount sought to be recovered is incorrectly increased under section 103(4).

In support of the contention that limitation is a good plea counsel for the defendant cited the case of *Government of Malaysia* v. *Ng Song Choon*.[1] It appears that in that case the taxpayer contested the Government's claim for income tax on the ground that the assessment of the tax was made out of time, i.e. after the expiry of the twelve years period prescribed under section 91(1) of the Income Tax Act. The Senior Assistant Registrar gave the defendant unconditional leave to defend on the ground that a triable issue was disclosed. On appeal the High Court upheld the Senior Assistant Registrar's decision. In his judgment Arulanandom J. described the issue raised by the taxpayer in that case as follows:

"It is essentially a legal issue and it falls outside the scope of section 106(3) which only lays down that the courts shall not entertain any plea for the amount of tax to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased under section 103(4) or (5). In this case no such plea is being raised before the court and therefore in strictly construing the section the court should not extend it to mean no plea shall be entertained by the court."

From the report it does not appear that attention of the learned judge was drawn to section 99(1) of the Income Tax Act. If that section was referred to him, he might have come to a different conclusion and might have held that the issue raised was an issue to be tried by the Special Commissioners and that the High Court has no jurisdiction to try it in the first instance but only on appeal from the Special Commissioners' decision. With due respect, my own view is that a contention that the assessment of tax was was made out of time in contravention of section 91(1) is a plea that the tax was incorrectly assessed within the meaning of section 106(3).

In the present case I hold that there is no defence to the plaintiff's claim and I accordingly grant an order in terms of the summons.

Claim allowed.

Solicitors: *Sethu, Ghazali & Gomez.*

P.S.W. LTD. v. DIRECTOR GENERAL OF INLAND REVENUE

[A.C.J. (Ajaib Singh J.) June 10, 1981]
[Seremban — Tax Appeal No. 1 of 1979]

Revenue Law — Income Tax — Joint venture — Know-how agreement — Services agreement — Transfer of know-how — Whether consideration for transfer a capital receipt — Payment under services agreement — Whether business income — Double Taxation Relief (India) Order, 1976 — Income Tax Act, 1967.

In this case the appellant company a company incorporated in India, participated in a joint venture for the growing of sugar cane and the manufacture of sugar with the Negeri Sembilan Development Corporation. For such purpose the appellant entered into a know-how agreement and a services agreement. Under the know-how agreement the appellant sold to the Corporation all the processes, formulae, knowledge and technical know-how, the consideration being the allotment of 1,500,000 shares in the Syarikat Gula Negeri Sembilan set up to use the know-how. Under the services agreement the appellant provided agriculture, commercial, technological, scientific and administrative assistance and expertise to the Syarikat for the purpose of setting up the sugar cane plantation and factory. The consideration for the services was the lump sum of $600,000 which was paid by instalments. The appellant's company was registered as a foreign company in Malaysia. The appellant was assessed to income tax and development tax on the consideration under the know-how and services agreement. The appellants appealed to the Special Commissioners of Income Tax. The Special Commissioners held that the law applicable was the Double Taxation Relief (India) Order, 1976. They decided that the consideration for the know-how constituted royalty income under Article 13 of the Order and they confirmed the assessment. The appellant appealed against this decision. With regard

to the consideration under the services agreement they held that it was not royalty income but business income under Article 7 of the Order. They accordingly ordered the assessment to be amended to give effect to this decision. The respondent cross-appealed against this decision.

Held: (1) upon a proper construction of the agreements in this case the consideration which the appellant received under the know-how agreement was a capital receipt and not a revenue receipt. The appeal of the appellant must therefore be allowed;

(2) the Special Commissioners were correct in holding that the sum of $600,000 paid to the appellant under the services agreement was business income and not royalty under the Double Taxation Relief (India) Order and therefore the cross-appeal must be dismissed.

Cases referred to:-

(1) *Jeffrey* v. *Rolls-Royce Ltd.* 40 T.C. 443.

(2) *Musker* v. *English Electric Co. Ltd.* 41 T.C. 556.

(3) *Evans Medical Supplies Ltd.* v. *Moriarty* 37 T.C. 540.

TAX APPEAL.

J.J. Puthucheary for the appellant.

Sufardi Haji Rijan (Federal Counsel) for the respondent.

Ajaib Singh J.: This is an appeal and a cross-appeal from the decision of the Special Commissioners of Income Tax.

The facts which the Special Commissioners found proved or admitted may be summarised as follows: —

The appellant company was incorporated in India on March 8, 1933 with its registered office situated in Bombay. Since then it has engaged in the growing of sugar-cane and the manufacture of sugar in India thereby acquiring considerable technical know-how, experience, information and skill in this field. On November 24, 1972 the Negeri Sembilan Development Corporation (hereinafter referred to as "the Corporation") entered into three agreements with the appellant for the purpose of setting up a joint venture namely —

(i) Know-how agreement;

(ii) Services agreement; and

(iii) Investment agreement.

Under the know-how agreement the appellant sold to the Corporation for use in Malaysia all the processes, formulae, knowledge and technical know-how which had been developed by the appellant for the establishment, organisation, erection and installation of a sugar-cane plantation and sugar factory and the production of sugar and allied products. The Corporation was to make use of all these processes as it might think fit and to dispose of the same to any person for the purpose of their application within Malaysia subject to the consent of the appellant which consent was not to be unreasonably withheld. The Corporation agreed not to part with these processes and the technical know-how within Malaysia without the consent of the appellant; also that the Corporation should not supply, sell, dispose or otherwise dispose of the technical information provided by the appellant to any person outside Malaysia and the appellant was not to supply, sell or disclose information on the know-how to any person within Malaysia other than the Corporation.

In accordance with the know-how agreement the Corporation incorporated a private limited company in Negeri Sembilan known as Syarikat Gula Negeri Sembilan (hereinafter referred to as "the Syarikat") for the purpose of using the said technical know-how and for the purpose of setting up the sugar-cane plantation and factory. The Syarikat was duly incorporated on November 16, 1972 and it adopted and ratified all the three agreements which the appellant had entered into with the Corporation. In due course the appellant delivered to the Corporation the technical material relating to the know-how and also provided skilled personnel under the services agreement to supervise and implement the know-how agreement and the services agreement.

The consideration for the sale of the use of the know-how was by allotment of 1,500,000 shares in the Syarikat to the appellant which was allotted on various dates with a face value of $1,500,000. The allotment of 600,000 shares on September 27, 1973 was the subject-matter of the appeal which was heard by the Special Commissioners of Income Tax in respect of a notice of assessment for the year of assessment 1974 which was issued to the appellant. This allotment of shares was recorded by the appellant as a capital receipt in the appellant's balance sheet.

Under the services agreement the appellant provided agricultural, commercial, technological, scientific and administrative assistance and expertise to the Syarikat for the purpose of setting up the sugar-cane plantation and factory. The consideration for the services under this agreement was a lump sum of $600,000 which was paid by instalments. This sum of $600,000 was recorded in the accounts of the appellant as a revenue receipt.

The appellant company was registered as a foreign company in Malaysia on July 5, 1973 with its registered office in Seremban.

The appellant was assessed to income tax and development tax on the consideration received under the services agreement in respect of which notices of assessment were issued for the years of assessment 1974, 1975 and 1976.

Under the investment agreement the appellant agreed to take up additional shares in the Syarikat at the face value of $2,500,000 which were allotted to it on October 13, 1975 and the appellant in turn imported machinery from India for the Syarikat.

The Syarikat commenced production on February 28, 1975 and as at October 15, 1975 the appellant held $3,400,000 worth of shares and the Corporation $5,000,000 worth of shares in the Syarikat.

So much for the summary of the facts as set out in the case stated by the Special Commissioners. I should point out however that there are two paragraphs in the statement of facts which are not facts really but conclusions of law. And these very paragraphs are embodied in the deciding order of the Special Commissioners and are the subject-matter of the appeal before me. In the circumstances therefore I ignored these two paragraphs as facts and took them as conclusions in law. These two paragraphs read

as follows: —

"(m) the consideration received by the appellant constituted royalty income under the Double Taxation Relief (India) Order 1976 (hereinafter referred to as 'the India Order') and was derived in Malaysia;

(t) the consideration received under the Technical Services Agreement was business income attributable to a permenant establishment of the appellant in Malaysia (pursuant to the India Order) and was not royalty under the India Order. Furthermore it was derived from Malaysia;"

The Special Commissioners of Income Tax were of the view that the law applicable in this case was the Double Taxation Relief (India) Order 1976 (hereinafter referred to as "the India Order") and not the Income Tax Act 1967. I agreed with this view. The appellant clearly came witnin the provisions of the India Order. It made no difference however to the ultimate tax assessment of the appellant as the rate of tax had to be calculated under the Income Tax Act 1967.

The Special Commissioners of Income Tax then decided that the consideration under the know-how agreement constituted royalty income under Article 13 of the India Order and was therefore chargeable to income tax at the rate of 15% of gross value pursuant to Part II of Schedule I of the Income Tax Act 1967. They accordingly confirmed this aspect of the assessment which the Revenue had made against the appellant and the appellant appealed to the High Court against this decision of the Special Commissioners.

With regard to the consideration under the services agreement the Special Commissioners decided that it was not royalty income but was business income under Article 7 of the India Order. They accordingly directed that this aspect of the assessment be amended to give effect to their decision and the Revenue has cross-appealed against this decision.

In coming to the conclusion that the consideration for the know-how was a revenue receipt and not a capital receipt the Special Commissioners appear to have been influenced by two cases namely *Jeffrey* v. *Rolls-Royce Ltd.*[1] and *Musker* v. *English Electric Co. Ltd.*[2] In the first of these two cases Rolls-Royce had entered into a number of agreements with several foreign governments and foreign companies for the supply of information for the construction of aeroplane engines and to license those governments and companies to manufacture the engines. The agreements were made with China, Argentina, Belgium, Australia and companies in France, the United States of America and Italy. The Special Commissioners decided that the payments received by Rolls-Royce under these agreements were capital receipts and not revenue receipts and their decision was upheld in the Chancery Division. The Special Commissioners as well as Pennycuick J. in the Chancery Division relied mainly on the case of *Evans Medical Supplies Ltd.* v. *Moriarty*[3] where it was held that the consideration for the transfer of know-how in the manufacture of pharmaceutical products constituted a capital receipt and not a revenue receipt. But on further appeal in *Jeffrey's* case the Court of Appeal and the House of Lords decided in favour of the Crown and held that the receipts were revenue receipts and not capital receipts. Both the Court of Appeal and the House of Lords distinguished the *Evans Medical Supplies* case, *supra.* Viscount Simonds in the House of Lords had this to say in *Jeffrey's* case at page 490: —

"In the present case, the company over a number of years received under agreements — which were sometimes called licence agreements and sometimes convention agreements — various sums of money, and amongst them substantial sums which were described as capital sums. It was urged on its behalf that these sums were the consideration that it received for the sale of a fixed capital asset and that therefore they could not be regarded as income for tax purposes.

My Lords, it appears to me to beg the question to refer to that which the company sold as a fixed capital asset. I will not analyse the several agreements made by the company, first with the Chinese Government and afterwards with other foreign governments and companies. It may be said compendiously, in the words of Pearce, L.J. that what the Chinese Government received and the company gave were technical knowledge, plans, a licence and facilities for the interchange of staff. An important and valuable part of the consideration was, I think, the undertaking by the company to communicate, so far as it was permitted to do so, future improvements and developments. Can these things be regarded as a fixed capital asset and the communication of them as the disposal of that asset? I do not think so. It appears to me (and I venture once again to quote the apt words of the learned Lord Justice) that the only proper conclusion is that

'in territories where the company could not hope to sell its engines, it was pursuing a wise policy of allowing local manufacture from which it would receive the benefits of advertisement, lump sums and royalties.'

This it did, not by parting with assets but by using or trading in them in the only, or at least the most advantageous, way that was open to it."

The reasoning and principles applied in the second case namely *Musker* v. *English Electric Co. Ltd., supra,* were generally on the same lines as those of *Jeffrey's* case and it was held by the Chancery Division, the Court of Appeal and the House of Lords, reversing the decision of the Special Commissioners, that the sums paid to English Electric were revenue receipts and not capital receipts.

Now turning to the present appeal before me the Special Commissioners have in my view erred in deciding that the consideration received by the appellant company from the know-how agreement was a revenue receipt. The present case is almost on all fours with the *Evans Medical Supplies* case. In the cases of *Jeffrey* and *Musker* the companies had entered into several agreements with a number of foreign governments and foreign companies whereas in *Evans Medical Supplies* case and in the present case before me there was only one isolated transaction. A part of the head-note in the *Evans Medical Supplies* case reads as follows at page 540 —

"The appellant company, which manufactured pharmaceutical products and had a world-wide trade, carried on business in Burma through an agency. In 1953 the Burmese Government wished itself to establish an industry there for the production of pharmaceutical and other products, and the company secured a contract, dated 20th October, 1953, from the Burmese Government to assist in setting up this industry. The company undertook to disclose secret processes to the Burmese Government and to provide other information in consideration of the payment of a 'capital sum of £100,000'. The company also undertook to provide certain services and to manage the proposed factory in return for an annual fee, which was admitted to be subject to tax. No similar agreement had been entered into by the company with any other foreign government or any other party."

Upjohn J. in his judgment in the above case had this to say at page 551 —

"...The company parted with its secret processes to the Burmese Government for ever, but upon the terms that the Government would not without the consent of the company impart such information to another, such consent not to be unreasonably withheld. The company remained at liberty to carry on its wholesale trade there, and, in legal theory, could no doubt have thereafter set up a competing factory in Burma. In addition, the company was to supply technical data, drawings, designs and plans for the erection of a factory and of the installation of machinery appropriate and suitable for the manufacture of these known pharmaceutical products and for their processing by these secret processes. After the expiry of the contract (but not before) the company was at liberty to impart its 'know-how' in relation to these matters to others in Burma. In part II of the agreement, in consideration of an annual fee admittedly subject to tax, the company undertook the training of personnel and also to act as purchasing agent of the Burmese Government.

The Commissioners' conclusions on this part of the case are set out in paragraph 15(i) to (iii) and may be summarised in this way: (i) that each part of the agreement could not be considered separately, and that £100,000 was not paid simply for the sale or assignment to the Burmese Government of secret processes; (ii) that the company had not sold or assigned any property; (iii) reading the agreement as a whole together, the agreement was one for the provision of services. These contentions were naturally supported by Sir Frank Soskice, who compared the services to be rendered by the company to the services rendered by a barrister, an architect or an accountant, and he put in the forefront of his argument that this was no real sale by the company of its secret processes but the provision of confidential information rather on the lines of *Exchange Telegraph Co., Ltd.* v. *Gregory & Co.*, (1896) 1 Q.B. 147.

In my judgment, the Commissioners have misunderstood and misconstrued the agreement. While the agreement must be read as a whole, the question to be asked is what, upon the proper construction of the agreement, was the *quid pro quo* for payment of the £100,000? I cannot see that it bears any relationship to the services rendered by a professional man in the course of carrying on his profession. I have already pointed out that the company was not carrying on a trade in providing such services.

The company was bound to provide its expert knowledge, its 'know-how' in the manufacture of pharmaceutical products, in the erection of a suitable factory and the provision of proper machinery in order to enable the Burmese Government to set up a new industry once and for all in Burma; the recitals are all important. The company was, in fact, parting for ever with its secret information in its methods of preparation, packing and preservation to the Burmese Government; that may not in law amount to an assignment of all its rights in Burma, for the company in legal theory, though hardly in practical Burmese politics, remained at liberty to use the processes itself in Burma. Of course, it also remained at liberty to carry on its business of wholesale druggists there by selling its products made in this country, in Burma, through its usual agents. But it was parting for ever with part of a valuable asset, and was doing so to enable an entirely new and competing industry to be set up there. That industry, established by the skill and 'know-how' of the company, could embark on an export trade which could compete with the company's own products in other countries. In that sense the company was dissipating its asset, and it must be remembered that a secret process once communicated to another is in jeopardy; if it gets into the wrong hands, the grantor has no protection. Even if it be a necessary ingredient to support a capital payment to show some dissipation of a capital asset (which, in my judgment, it is not), that element seems to me to be present here.

Bearing all these considerations in mind, I reach the conclusion that, upon the true construction of the agreement viewed in the light of the facts of this particular case, the payment of £100,000 is what it is described to be, a capital payment."

This decision of Upjohn J. was upheld in the House of Lords.

Upon a proper construction of the three agreements in the present appeal I would say that the consideration which the appellant received under the know-how agreement was a capital receipt and not a revenue receipt. I think it is pertinent to point out some important clauses in the three agreements which tend to support the view that the consideration under the know-how agreement was a capital receipt. In the recitals in the know-how agreement it is stated that "the Corporation is desirous of acquiring complete designs, information, drawings, technical data relating to processes, formulae, knowledge and technical know-how of the production and manufacture of sugar in Malaysia." The last two recitals are in the following terms —

"AND WHEREAS Phaltan has agreed to sell and the Corporation has agreed to buy for use in Malaysia such processes, formulae, knowledge and technical 'know-how' developed by Phaltan.

AND WHEREAS Phaltan is owner of the 'know-how' as expressed in the processes, formulae, knowledge and technical 'know-how' listed in the Schedule hereto."

In the investment agreement it is stated *inter alia* in the recitals as follows —

"AND WHEREAS by an Agreement bearing even date with this Agreement (hereinafter called 'the Know-How Agreement') Phaltan has agreed to sell to the Corporation the requisite 'Know-How' for the establishment of the said sugar industry for the consideration therein mentioned."

And in the services agreement also mention is made of the sale and purchase of the know-how as follows —

"AND WHEREAS the Corporation for and on behalf of Gula N.S. has purchased from Phaltan the 'Know-How' for the establishment and operation of a sugar industry.

AND WHEREAS the Corporation for and on behalf of Gula N.S. requires the specialised assistance and services of Phaltan to utilise and implement the 'Know-How' so acquired and Phaltan has agreed to accept such appointment upon the terms and conditions hereinafter appearing."

It would appear therefore that the appellant had in the particular circumstances of this case sold away a capital asset — the technical know-how in the production of sugar-cane, the manufacture of sugar and the setting-up of a sugar factory. The fact that the appellant was allotted shares in the Syarikat cannot alter the character of the transaction.

The Special Commissioners also appear to have been swayed by a clause in the services agreement which provided that the appellant shall keep the Syarikat "informed of future developments of technical and manufacturing processes of sugar and allied products." Viscount Simonds had considered a somewhat similar clause in *Jeffrey's* case and had come to the conclusion that the undertaking by Rolls-Royce to communicate to the Chinese Government future improvements and developments could not be regarded as a fixed capital asset. But an important distinction to be noted here is that in *Jeffrey's* case there was only one agreement incorporating the know-how and the services to be rendered. The various clauses relating to know-how and to services appear to be inseparable. In the present appeal however there were separate agreements — one for the know-how and another for services. There were in fact three agreements here and it may well be that in construing any one of the three agreements the other two agreements may be

looked into as an aid to the construction of the first one but I do not think that the clause in the services agreement relating to future developments of technical and manufacturing processes of sugar and allied products can be read into the know-how agreement so as to alter the character of the payments which the appellant received from the Corporation under this know-how agreement.

The services agreement and the consideration received by the appellant thereunder were the subject-matter of the cross-appeal by the Revenue and on this I agreed with the Special Commissioners that the sum of $600,000 paid to the appellant under the services agreement was business income under the India Order and not royalty under the said Order.

In the event I allowed the appeal of the appellant and dismissed the cross-appeal by the Revenue with costs.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: *Skrine & Co.*

OOI BOON PAK & ORS. v. TEOH KEE KEONG

[O.C.J. (Arulanandom J.) May 25 & June 15, 1981]
[Penang — Originating Motion No. 42 of 1981]

Land Law — Caveat — Application to remove — Access to caveator's mining land — Effect of removal of caveat — Court's refusal to expose caveator to complete closure of access to mining land.

The plaintiffs applied to remove a caveat lodged by the defendant. The plaintiffs sought to register a Memorandum of Transfer of the property concerned free from encumbrances in the name of a third party to whom the plaintiffs had sold the property.

On December 11, 1975, the plaintiffs had entered into agreement with the defendant wherein the defendant in consideration of the plaintiffs allowing the defendant to construct a vehicle road for the defendant's use to have access to the sand mine operations of the defendant agreed to pay $350 a month. It was on the strength of the said agreement that the said caveat was lodged. On January 1, 1978, the said agreement was varied by the monthly payment being reduced to $300 a month. The plaintiffs alleged that the said agreement was rescinded in October 1980. The plaintiffs further claimed that the defendant was in breach of the agreement because he did not pay the $300 on the first week of the month without fail although there was nothing in the agreement to indicate that time was the essence of the contract. The defendant, on the other hand, contended that he used to pay the rentals in arrears but since February 1980 the plaintiffs had refused to accept the rent.

Held, dismissing the plaintiffs' application: (1) on considering the conduct of the plaintiffs, it was quite clear that the plaintiffs acted *mula fide* and intended to obstruct the defendant's access, and thus prevent him from operating his sand mine;

(2) if the caveat were removed and the new purchasers do not recognize the defendant's right of access, it would cause undue hardship and irreparable damage to the defendant;

(3) when the caveator's interest requires protection then the courts would refuse applications for removal summarily; no court of equity could order summary removal of the caveat and expose the caveator to a complete closure of access to his land where he is operating a sand mine; the proper course would be for a writ to be issued and the issues brought up for trial where the court could make such order as the court thinks just;

(4) hence, in this case if the matter were properly adjudicated, the court, if it considers it just and reasonable, could order the amendment of the caveat to protect the interests of the defendant so far as the access to his mine was concerned and permit the registration of the transfer subject to the defendant's rights. Before doing this, the parties should be heard in a proper trial so that all facts could be fully established.

Case referred to:-

(1) *N. Vangedaselam* v. *Mahadevan & Anor.* [1976] 2 M.L.J. 161.

ORIGINATING MOTION.

N.G. Sivanandan for the plaintiffs/applicants.

Mahinder Singh Dulku for the defendant/respondent.

Cur. Adv. Vult.

Arulanandom J.: This was an application by the plaintiffs for the following reliefs: —

"(1) That the Registrar of Titles be directed to remove the Private Caveat No. 2685/80 Jilid No. 50 Folio No. 36 dated the 1st day of December 1980 entered against the aforesaid lands.

(2) That the defendant do pay the plaintiffs compensation for any damage or loss occasioned by the defendant's wrongful entry of the Private Caveat.

(3) That the costs of and incidental to this application be taxed as between party and party on the Higher Scale and paid by the defendant to the plaintiffs."

The purpose of the application is for the plaintiffs to register a Memorandum of Transfer of all that piece of land known as Lot No. 353 Mukim 13, Sungei Relau, Daerah Timor Laut (hereinafter referred to as the said property) free from all encumbrances in the name of Chong & Company Sdn. Bhd. to whom the plaintiffs had sold the said property and received the consideration.

The plaintiffs in their affidavit affirmed on March 27, 1981 admit that on December 11, 1975 one of them entered into an agreement with the defendant wherein the defendant in consideration of the plaintiffs allowing the defendant to construct a vehicle road for the defendant's use to have access to the sand mine operations of the defendant on Lot 2115 agreed to pay the sum of $350 a month. It was on the strength of this agreement that the said caveat was lodged. On January 1, 1978 this agreement was varied by the monthly payment being reduced to $300 a month. But the plaintiffs now allege that this agreement was rescinded in October 1980 but apart from their mere allegation there is no evidence that the agreement was in fact rescinded. The plaintiffs claim that the defendant was in breach of the agreement because he did not pay the $300 on the first week of the month without fail although there is nothing in the agreement to say that time was of the essence of the contract.

Furthermore there is evidence that the defendant through his solicitors forwarded a cheque for $3,000 to cover arrears of rent to the plaintiffs by A.R. Registered post but this letter was returned unopened to the defendant's solicitors with the endorsement "Refused". The defendant further alleges that he used to pay the rentals in arrears but since February 1980 the plaintiffs had refused to accept the rent. This is categorically stated in the letter of the defendant's